89-95

No.

Supreme Court, U.S.
FILED
JUL 18 1989
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

RIVERFRONT ASSOCIATES, LTD., a limited partnership, DAVID B. TALBOT, JR. and DAVID S. OWEN,

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Receiver for Mainland Savings & Loan Association,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RICHARD D. HAMPTON
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QUESTIONS PRESENTED

1. Whether the provisions of 12 U.S.C. §1823(e) designed to protect the Federal Deposit Insurance Corporation (hereinafter referred to as "FDIC") extend to actions brought by and against the Federal Savings and Loan Insurance Corporation (hereinafter referred to as "FSLIC").

2. Whether the principles of *D'Oench, Duhme and Co. v. Federal Deposit Insur. Corp.*, 315 U.S. 447, 86 L.Ed. 956, 62 S. Ct. 76 (1942) (hereinafter referred to as "D'Oench"), extend and apply to Petitioners' defenses and counterclaims against actions maintained by FSLIC as Receiver for Mainland Savings Association (hereinafter referred to as "MS") when:

(a) at the time the FSLIC was appointed Receiver for MS the files and records of MS contained fully executed loan committee minutes authorizing and granting Petitioners a construction loan which had been previously orally promised by MS; and

(b) Petitioners seek set-off damages for claims arising from MS' failure to disclose and fund said authorized loan.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

RIVERFRONT ASSOCIATES, LTD., a limited partnership, DAVID B. TALBOT, JR. and DAVID S. OWEN,
Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Receiver for Mainland Savings & Loan Association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on April 20, 1989.

OPINIONS BELOW

The April 20, 1989 opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 872 F.2d 955 (Tenth Cir. 1989) and is reprinted in Appendix A, page A5 and as published in Appendix A,

page A1. The prior opinion of the United States District Court for the Western District of Oklahoma, is also reprinted in Appendix B, page A10 and beginning at page A11. The same is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered April 20, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 12 U.S.C. §1823(e) which provides as follows:

The same is reprinted in Appendix C, page A38.

STATEMENT OF THE CASE

MS brought its action in the District Court of Oklahoma County, Oklahoma upon Petitioners' promissory note, guaranty agreements and real estate mortgage for judgment on the note, guaranty agreements and foreclosure. The same were facially unqualified.

Petitioners answered and counterclaimed alleging breach of oral agreement to fund a construction and permanent loan, breach of implied covenant of contractual fair dealing, fraud, gross negligence and reckless conduct and sought damages for destruction and total loss of their commercial development project.

On April 4, 1986 the FSLIC was appointed Receiver for MS and thereafter removed the action to the United

States District Court for the Western District of Oklahoma which Court, upon application of FSLIC, reduced Petitioners' claims to set off only under the doctrine of *North Mississippi Savings & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (CA 5).

On June 12, 1987 the FSLIC moved for summary judgment upon said promissory note and guaranty agreements upon the basis of the D'Oench Doctrine and 12 U.S.C. §1823(e) which was granted on September 17, 1987 by the United States District Court for the Western District of Oklahoma by applying the D'Oench Doctrine.

Prior to said summary judgment, Petitioners' discovery disclosed from the records of MS its fully executed loan committee minutes of February 12, 1985 granting and authorizing the construction and permanent loan to Petitioners previously orally promised.

Said authorized loan was never previously disclosed nor funded to Petitioners and was authorized as re-submission of Petitioners' previous construction and permanent loan which was rejected by Petitioners as being then inadequate for its intended purposes of (a) paying and satisfying the loan MS sued upon and (b) constructing improvements for the contemplated commercial project.

Petitioners filed their Notice of Appeal of the above decision to the United States Court of Appeals for the Tenth Circuit on October 13, 1987 contending that the trial court erroneously applied D'Oench and that 12 U.S.C. §1823(e) was inapplicable in that its afforded protection does not extend to the FSLIC.

At the urging of the FSLIC the said Court of Appeals affirmed the judgment of the trial court relying not only on D'Oench but also on the provisions of 12 U.S.C. §1823 (e) as an extension of D'Oench.

THE EVIDENCE

On July 30, 1984 Petitioners made their application for their first loan from MS as an acquisition loan primarily for purposes of purchasing the mortgaged property. (Appendix D, pages A40-42).

Subsequently, MS funded that loan in the amount of $1,700,000 upon Petitioners' promissory note, mortgage and guaranty agreements facially unqualified. MS then committed to $5,500,000 construction and permanent loan (Appendix D, pages A44-46) which was rejected by Petitioners as inadequate for its purpose.

MS then authorized and granted its construction loan for $6,500,000 on February 12, 1985 as evidenced by its fully executed loan committee minutes as a re-submission of the first loan dated September 12, 1984. (Appendix D, pages A48-49). Thus, the authorized and recorded loan in MS' records was not contemporaneous with the execution of Petitioners' note and guaranty agreements.

MS did not disclose the authorized loan of February 12, 1985 which was made known to Petitioners in May, 1987. (Appendix D, page A50).

THE RULINGS BELOW

The District Court ruled, in granting the FSLIC its summary judgment, that the case at bar was a classic case for the application of the D'Oench doctrine while ignoring the written evidence of the loan authorized and granted Petitioners recorded in MS' records at the time the FSLIC became Receiver. (September 17, 1987 Transcript of Proceedings. Western District of Oklahoma). (Appendix B, page A35).

The Court of Appeals affirmed the District Court's judgment and reasons therefor and extended the 12 U.S.C. §1823(e) protection to the FSLIC, holding that no good reason exists for treating the FDIC and the FSLIC differently although neither Congress nor the Supreme Court has authorized such similiar treatment.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to clarify whether the provisions of 12 U.S.C. §1823(e) extend to actions brought by the FSLIC.

Neither Congress nor this Court has extended 12 U.S.C. §1823(e) to the FSLIC. (Opinion, Court of Appeals, Page 3).

Although the Opinion of the Court of Appeals stated the case of *Andrew D. Taylor Trust v. Security Trust Fed. Savings and Loan Ass'n, Inc.*, 844 F.2d 337, 342 (6th Cir. 1988) and its progeny protect FSLIC and FDIC, alike that case does not so hold. Only a footnote discusses same and the authority cited there was an FDIC case.

This is the first case putting such issue squarely before this Court to the knowledge of Petitioners.

II.

Certiorari should be granted for failure of the Tenth Circuit Court of Appeals to certify the above question to this Court.

III.

Certiorari should be granted to determine whether D'Oench applies when a failed savings and loan institution's records contain loan committee minutes granting and authorizing a loan.

Whether D'Oench applies to an insured savings and loan's authorization and grant of a loan previously orally promised, which was reflected in and authorized by executed minutes of its loan committee, has not been considered nor decided by any Court, including the Court of Appeals in this case to the best of Petitioners' knowledge. No case has been found.

Petitioners' contention is that D'Oench cannot be invoked:

(1) since the loan committee minutes clearly showed that the loan was granted and, moreover, was granted pursuant to Petitioners' original loan application; and

(2) because Petitioners are not required to bring this action on nor rely upon any prior oral promises to authorize and grant a loan. The loan has been authorized and granted and was a part of MS' records when the FSLIC became Receiver;

(3) because, in any event, neither D'Oench nor 12 U.S.C. §1823(e) bars Petitioners' claims for failure to disclose and fund the loan authorized on February 12, 1984.

Petitioners' facially unqualified promissory note became meaningless upon the loan committee's authorized loan for D'Oench purposes.

The Court of Appeals' supporting authorities involved no written executed instrument in the failed institution's records.

IV.

Certiorari should be granted to determine whether this Court should apply the same rationale in the case at bar that it applied in Coit Independence Joint Venture v. FSLIC, 489 U.S. ....., 103 L.Ed.2d 602, 109 S. Ct. 1361.

V.

Certiorari should be granted to determine and resolve whether authorized loans in writing, recorded in a failed savings and loan institution's records at the time FSLIC becomes Receiver, are within the scope of either D'Oench or 12 U.S.C. §1823(e).

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

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Oklahoma City, Oklahoma 73103
(405) 525-6950
Attorneys for Petitioners

APPENDIX

APPENDIX A

(Filed April 20, 1989)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 87-2544

MAINLAND SAVINGS ASSOCIATION,
a Texas Corporation,
Plaintiff-Appellee,

&

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION,
Intervenor-Appellee,

vs.

RIVERFRONT ASSOCIATES, LTD., an Oklahoma limited partnership, GAF STRUCTURES INCORPORATED, a corporation, DAVID B. TALBOT JR., and DAVID S. OWEN,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civ-86-1003-P)

Jo Ann Abramson, Office of General Counsel, Federal Home Loan Bank Board, Washington, D.C. (Grey W. Satterfield of Kornfield, Franklin & Phillips, Okla-

homa City, Oklahoma, Jordan Luke, General Counsel, David G. Eisenstein, Office of General Counsel, Federal Home Loan Bank Board, Of Counsel, on the brief), for Plaintiff-Appellee and Intervenor-Appellee.

Richard D. Hampton (James C. Hanna with him on the brief), Oklahoma City, Oklahoma, for Defendants-Appellants.

Before BALDOCK, BRORBY and EBEL, Circuit Judges.

PER CURIAM

Intervenor-appellee, Federal Savings & Loan Insurance Corporation (FSLIC), as receiver of Mainland Savings Association (Mainland), assumed this action seeking judgment on a promissory note for $1,700,000 executed by defendants-appellants, Riverfront Associates (Riverfront) and its guarantors. Riverfront claimed a setoff based on Mainland's intentional fraud, gross negligence, reckless conduct, breach of an agreement to fund, and breach of the implied covenant of contractual fair dealing. According to Riverfront, Mainland reneged on its promise to fund a second loan in an amount sufficient to pay the first loan and provide for the construction of improvements upon certain real property. Relying on *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942), the district court rejected Riverfront's position and granted FSLIC summary judgment. Riverfront appeals. We affirm.

In *D'Oench*, 315 U.S. 456-62, the Supreme Court established that the debtor's signing of a facially unqualified note subject to an unwritten and unrecorded condition constitutes an arrangement which is likely to mislead fed-

eral insurers in contravention of the policy to protect them in their evaluation of financial institutions. Recently, in *Langley v. Federal Deposit Ins. Corp.*, 108 S. Ct. 396, 401 (1987), the Court reaffirmed *D'Oench*: "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." In *Langley*, the principle issue was the meaning of the word "agreement" in 12 U.S.C. § 1823(e).[1] Although that statute, which codifies the principles established in *D'Oench*, by its terms applies only to the FDIC, the *D'Oench* doctrine survives as an independent basis for protecting the FSLIC from undisclosed agreements. *E.g., Firstsouth F.A. v. Aqua Constr., Inc.*, 858 F.2d 441, 442-43 (8th Cir. 1988) (§ 1823(e) used by analogy to protect the FSLIC); *Federal Savings & Loan Ins. Corp. v. Murray*, 853 F.2d 1251, 1254 (5th Cir. 1988) (while neither Congress nor the Supreme Court has extended § 1823(e) to the FSLIC, no good reason exists for treating the FDIC and FSLIC differently); *Andrew D. Taylor Trust v. Security Trust Fed. Savings and Loan Ass'n, Inc.*, 844 F.2d 337, 342 (6th Cir. 1988) (*D'Oench* and its progeny protect the FDIC and FSLIC alike against arrangements

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1. § 1823(e) states in its entirety:

Agreements against interest of Corporation. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under the section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

"likely to deceive a federal regulatory authority"). Consequently, the defenses which may be asserted against federal banking authorities seeking to collect assets of insolvent financial institutions are limited.

Riverfront does not contest the principles established in *D'Oench* and *Langley*, but instead argues that Mainland's promise to fund a second loan is memorialized in writings contemporaneous to the original loan agreement and contained in the failed lender's books and records. We disagree. Nothing in the note, accompanying security agreements or other documents pertaining to the transaction evidences any type of conditional promise or side agreement on the part of Mainland of which the FSLIC might have been aware. Any injury Riverfront sustained in relying on the purported oral representations of Mainland regarding a second loan is insufficient to outweigh the potential harm to the FSLIC in this and other cases if Riverfront were permitted to assert its affirmative defenses. *See Langley*, 108 S. Ct. at 402-03.

Accordingly, the judgment of the district court is AFFIRMED.

(Filed April 20, 1989)

MAINLAND SAVINGS ASSOCIATION,
a Texas Corporation,
Plaintiff-Appellee,

and

Federal Savings & Loan Insurance
Corporation, Intervenor-Appellee,

v.

RIVERFRONT ASSOCIATES, LTD., an Oklahoma limited partnership, GAF Structures Incorporated, a corporation, David B. Talbot, Jr., and David S. Owen,
Defendants-Appellants.

No. 87-2544.

United States Court of Appeals,
Tenth Circuit.

April 20, 1989.

Federal Savings and Loan Insurance Corporation, as receiver of savings and loan association, assumed action against borrower and guarantors to recover on promissory note. Borrower and guarantors claimed set-off based on savings and loan's failure to comply with alleged oral agreement to fund a second loan. The United States District Court for the Western District of Oklahoma, Layn R. Phillips, J., granted summary judgment in favor of FSLIC. Borrower and guarantors appealed. The Court of Appeals held that *D'Oench* doctrine precluded borrower and guarantors from asserting set-off claim.

Affirmed.

Building and Loan Associations (Key) 48

D'Oench doctrine, precluding enforcement against Federal Savings and Loan Insurance Corporation of oral agreements between borrowers and lenders, precluded borrower and guarantors from asserting claim for set-off against FSLIC, which brought action on promissory note as receiver for savings and loan association, arising out of alleged savings and loan oral promise to fund second loan in an amount sufficient to pay first loan and provide for construction of improvements upon certain real property.

Jo Ann Abramson, Office of Gen. Counsel, Federal Home Loan Bank Bd., Washington, D.C. (Grey W. Satterfield of Kornfield, Franklin & Phillips, Oklahoma City, Okl., Jordan Luke, Gen. Counsel, David G. Eisenstein, Office of Gen. Counsel, Federal Home Loan Bank Bd., of counsel, on the brief), for plaintiff-appellee and intervenor-appellee.

Richard D. Hampton (James C. Hanna with him, on the brief), Oklahoma City, Okl., for defendants-appellants.

Before BALDOCK, BRORBY and EBEL, Circuit Judges.

PER CURIAM.

Intervenor-appellee, Federal Savings & Loan Insurance Corporation (FSLIC), as receiver of Mainland Savings Association (Mainland), assumed this action seeking judgment on a promissory note for $1,700,000 executed by defendants-appellants, Riverfront Associates (Riverfront) and its guarantors. Riverfront claimed a setoff based on Mainland's intentional fraud, gross negligence, reckless conduct, breach of an agreement to fund, and

breach of the implied covenant of contractual fair dealing. According to Riverfront, Mainland reneged on its promise to fund a second loan in an amount sufficient to pay the first loan and provide for the construction of improvements upon certain real property. Relying on *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the district court rejected Riverfront's position and granted FSLIC summary judgment. Riverfront appeals. We affirm.

In *D'Oench*, 315 U.S. at 456-62, 62 S.Ct. at 678-82, the Supreme Court established that the debtor's signing of a facially unqualified note subject to an unwritten and unrecorded condition constitutes an arrangement which is likely to mislead federal insurers in contravention of the policy to protect them in their evaluation of financial institutions. Recently, in *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987), the Court reaffirmed *D'Oench*: "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." In *Langley*, the principle issue was the meaning of the word "agreement" in 12 U.S.C. § 1823(e).[1] Although that statute, which

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1. § 1823(e) states in its entirety:

Agreements against interest of Corporation. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under the section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall

(Continued on following page)

codifies the principles established in *D'Oench*, by its terms applies only to the FDIC, the *D'Oench* doctrine survives as an independent basis for protecting the FSLIC from undisclosed agreements. *E.g., Firstsouth F.A. v. Aqua Constr., Inc.*, 858 F.2d 441, 442-43 (8th Cir.1988) (§ 1823 (e) used by analogy to protect the FSLIC); *Federal Savings & Loan Ins. Corp. v. Murray*, 853 F.2d 1251, 1254 (5th Cir.1988) (while neither Congress nor the Supreme Court has extended § 1823(e) to the FSLIC, no good reason exists for treating the FDIC and FSLIC differently); *Andrew D. Taylor Trust v. Security Trust Fed. Savings and Loan Ass'n, Inc.*, 844 F.2d 337, 342 (6th Cir.1988) (*D'Oench* and its progeny protect the FDIC and FSLIC alike against arrangements "likely to deceive a federal regulatory authority"). Consequently, the defenses which may be asserted against federal banking authorities seeking to collect assets of insolvent financial institutions are limited.

Riverfront does not contest the principles established in *D'Oench* and *Langley*, but instead argues that Mainland's promise to fund a second loan is memorialized in writings contemporaneous to the original loan agreement and contained in the failed lender's books and records. We disagree. Nothing in the note, accompanying security agreements or other documents pertaining to the transaction evidences any type of conditional promise or side agreement on the part of Mainland of which the FSLIC might have been aware. Any injury Riverfront

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Footnote continued—

> have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously from the time of its execution, an official record of the bank.

sustained in relying on the purported oral representations of Mainland regarding a second loan is insufficient to outweigh the potential harm to the FSLIC in this and other cases if Riverfront were permitted to assert its affirmative defenses. *See Langley*, 108 S.Ct. at 402-03.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

CIV-86-1003-P

MAINLAND Savings Assoc et al.,
Plaintiff,

vs.

Riverfront Assoc et al.,
Defendant.

CIVIL DOCKET CONTINUATION SHEET

Date	NR.	Proceedings
		* * *
09-17-87	112	MINUTE ORDER: The ct has found no indication that Judge Eubanks' previous ruling allowing dfts to pursue their claim as a setoff only was made w/knowledge that Mtn for SJ would later be entered; therefore, this Ct does not believe Judge Eubanks previous ord has the effect of allowing dfts to proceed on their setoff claim notwithstanding the fact that mtn for SJ is grtd. The grtg of plf's mtn has resolved all issues in this cs. (PHILLIPS) MICRO/SEPT wf
		* * *

(August 26, 1987)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CIV-86-1003-P

MAINLAND SAVINGS ASSOCIATION,
a Texas Corporation,
Plaintiff,

-vs-

RIVERFRONT ASSOCIATES, LTD., an
Oklahoma limited partnership et al.,
Defendants,

and

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION,
Intervenor.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
OKLAHOMA CITY, OKLAHOMA

REPORTED BY:

BETH ANN KIMREY, C.S.R., C.P.
OFFICIAL COURT REPORTER
3122 FEDERAL BUILDING
200 N.W. FOURTH STREET
OKLAHOMA CITY, OKLAHOMA 73102

[2] APPEARANCES

MR. GREY W. SATTERFIELD, Attorney at Law, 301 N.W. 63rd, Suite 600, Oklahoma City, Oklahoma 73116, appeared on behalf of the FSLIC.

MS. KATHLEEN E. FENWICK, Attorney at Law, Texas Commerce Tower, Houston, Texas 77002, appeared on behalf of the FSLIC.

MR. RICHARD D. HAMPTON and JAMES C. HANNA, Attorneys at Law, 109 N. Walker, Oklahoma City, Oklahoma 73102, appeared on behalf of the DEFENDANTS.

[3] PROCEEDINGS

THE COURT: Mainland Savings Association versus Riverfront Associates and Federal Savings and Loan Insurance Corporation, Intervenor, Case 86-1003.

Counsel, make your appearances, please.

MR. SATTERFIELD: Plaintiff is here and ready, Your Honor. Appearing for the plaintiff FSLIC as receiver for Mainland Savings Association, Grey W. Satterfield.

MR. HAMPTON: Defendants are here, appearing by Richard D. Hampton and James C. Hanna, H-a-double n-a.

THE COURT: There was a request by the defendants in this case for oral argument on this motion. I was prepared to issue a written order in connection with this case, but I'll be pleased to hear anything the defendants have to say.

MR. HAMPTON: Do you want to hear from the defendants first?

THE COURT: Are you the party that requested oral arguments?

MR. HAMPTON: Yes, Your Honor.

THE COURT: I'll be pleased to hear from you, then.

MR. HAMPTON: All right, Your Honor. May I, for facility purposes, pass up some exhibits?

THE COURT: Certainly. Are they already before [4] the Court?

MR. HAMPTON: Yes.

THE COURT: Very well.

MR. SATTERFIELD: May I inquire, so I don't have to interrupt counsel, if those are—oh, thank you. That solves it. I've been handed copies, Your Honor.

MR. HAMPTON: May I proceed, Your Honor?

THE COURT: Yes.

MR. HAMPTON: Of course Your Honor, I'm sure, is already familiar with most of the facts in this case.

THE COURT: I've read all the pleadings, and I know that your clients received the 1.7 million pursuant to a loan; that they spent the 1.7 million; and they say that they don't have to pay any of it back due to a condition precedent not being fulfilled.

MR. HAMPTON: Let me—if I may go through the facts rather briefly.

THE COURT: Have I mistated your position?

MR. HAMPTON: Well, in a sense. We were stating that by reason of the default of Mainland in connection with their agreement to fund the whole project, the defendants are unable to pay the note.

THE COURT: Well—

MR. HAMPTON: First of all—

THE COURT: —you're not just saying "unable." [5] You're saying that they don't have to. Whether they're able or not, your position is that they're not required to pay the note. So—

MR. HAMPTON: That's right, by reason of the other agreement.

THE COURT: So separate and apart from the issue of inability, you're taking the position that even though

you got the 1.7 million and spent the 1.7 million, because of the way this thing turned out, you don't have to pay back any of it.

MR. HAMPTON: By reason of the setoff, yes.

THE COURT: Very well.

MR. HAMPTON: Now, this project was down on Meridian north of the Park Suite Hotel on the river. My clients sought a single loan from Mainland to finance the project—commercial project. Mainland did not want to do that. Mainland proposed an acquisition loan, to be followed by the funding of a construction loan or a second phase loan, together with a mini-term or an intermediate permanent loan.

On July the 30th—and I refer to the loan application signed by Riverfront before Your Honor—1984, the defendants made an application in writing with Mainland for the 1.7 million. And the addendum on the back of that exhibit, which is a part of the exhibit, shows that it was [6] to be rolled over on the basis of a second phase loan of 80 percent of the appraised value.

It's important to keep in mind that at this point nobody knew what the appraised value was going to be after the construction was done or before it started. You had to have an appraisal. And the second loan was to be based upon the appraisal.

That loan was funded without any formal commitment whatsoever. No commitment was issued by Mainland. They made the loan. The relationship of the parties continued in—I think the loan was closed about August, went on up into October. And my clients presented the necessary budgets, appraisals, et cetera. And Mainland then at that time issued two commitments. And they're

before Your Honor. One on the 15th and one on the 16th, one for the construction loan at 5.5 million and one for the mini-term at 5.5 million.

At that point in time, by reason of changes in the project, in the construction, that was not enough money to do two things. As Your Honor will look at the loan application, to payoff the acquisition loan and to fund the construction. My clients send it back.

And then it's important to note that, I think, on February the 12th of 1985, after Mainland encouraged my clients to continue to put in the material that they [7] needed, they invested even more money for appraisals and—to satisfy the requirements of Mainland.

On that date the loan committee approved a 6.5 million dollar loan, signed by the loan committee. And that exhibit is before Your Honor, I think, No. 17.

Now we're here, as I understand it, for purposes of this argument, to discuss the *D'Oench* doctrine and not necessarily whether there was a breach of an agreement on the merits and that sort of thing. So let's go into that.

This was not a one-time visit to the bank where the banker tells the maker of a note, you know, "You don't have to pay this. We'll make a little on the side. And if it rains tomorrow, you don't have to pay it." We don't have that here.

What is strange about this particular case, number one, is that there are none other like it the defendants can find. The second thing that's strange about it is that the defendant—the intervenor is urging the *D'Oench* rule as applicable here when and after the 6.5 million dollar commitment was authorized by the loan committee.

The things I want to stress is that this is—they had performed; they're even at that point. What we have complained about on the merits is that we were never notified. In fact, they even authorized a payment of interest with a 90-day extension, which my clients say were [8] not—they were not informed of. So, consequently, let's examine these facts under the *D'Oench* doctrine or under Section 1823(e).

This is—there was nothing secret about this. There was nothing that you could call a side agreement. We even are here today with a performed—the authority was given. It was a matter of record. The requirements of Section 1823(e) have been met. The defendants can see no applicability of the *D'Oench* rule.

Now, the intervenor has said throughout—basically throughout—it's argument—that this is an oral agreement. Where is it oral? You have the application with the terms fixed, acknowledged, at least recognized because an officer of Mainland signed it.

THE COURT: Was the application incorporated into the note that was signed in connection with the 1.7 million dollar loan?

MR. HAMPTON: No, sir. No, sir. And—

THE COURT: So it is an agreement outside the 1.7 million dollar loan, though?

MR. HAMPTON: It is. And that's what the *D'Oench* rule is about here.

We're not trying to change the terms of the note. We're simply saying that there is no side agreement. We have another agreement. You call it collateral. You can [9] call it part of a greater comprehensive agreement.

But there has been no—there can be no application of the *D'Oench* doctrine because it's in writing.

THE COURT: If we call it another agreement, isn't that the same thing as a side agreement?

MR. HAMPTON: I don't—a side agreement? That's just one of the things. It's not a side agreement. It's part of the whole agreement, Your Honor.

THE COURT: Well—

MR. HAMPTON: But even so, it's before them. I think it's important to recognize that they have given the authority for the loan. And the purpose of the *D'Oench* doctrine does not exist here.

One of the first things examiners look at when they walk into a savings and loan—excuse me—as I understand it, would be the minutes. In fact, the fourth requirement of 1823(e) is, or at least one of the requirements, it's got to be signed by the loan committee or the directors.

We have the authority for the loan consistent with the application on the record. The reason for the *D'Oench* doctrine is satisfied; does not exist here.

May I go on on another subject?

THE COURT: Well, I have some concern about this issue of a side agreement. You told me just a few minutes [10] ago that I could refer to it as another agreement, part of a whole agreement, but we couldn't call it a side agreement for purposes of the *D'Oench* doctrine.

The problem I have is simply this: You have an agreement with respect to the 1.7 million dollar loan. You could have placed the terms that you're now arguing in that particular document. For reasons known only to the contracting parties, that was not done. You're now assert-

ing that the applications before the Court—and I believe they're Exhibits A, B, C, and D to your opposition to the motions for summary judgment—take this out of the *D'Oench* doctrine.

Show me where on Exhibits A, B, C, and D there is language that the Court should construe taking this out of the *D'Oench* doctrine.

MR. HAMPTON: Well, I can't show you any language, Your Honor. But what I'm saying is the—like in *Longhorn*—Judge Eubanks had a case here recently—

THE COURT: Well, let's get back to my question before we move along—

MR. HAMPTON: All right.

THE COURT: —to the *Longhorn* case.

I've looked at the exhibits. Tell me what it is about those exhibits and what part you say the Court should rely on in saying the *D'Oench* doctrine does not apply.

[11] MR. HAMPTON: Let me go to Section 1823 to answer your question.

One of the requirements is that the agreement shall be in writing. We have that.

THE COURT: You say that you've got that. Tell me what portion of Exhibits A, B, C, and D you say constitutes—

MR. HAMPTON: The application, the approval by the loan committee constitutes the writings—or constitute the writings.

No. 2: Shall be executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligator.

Now, again, we have the application. We have the loan committee approval. That's executed by the—the problem we have here, Your Honor, is we don't have a written formalized document, but we have writings which comprise the agreement.

THE COURT: Well, you do have a written formalized document with respect to the 1.7 million, correct?

MR. HAMPTON: Yes.

THE COURT: And the promise that you say that was made to you with regard to the 1.7 million dollar loan is not contained in that document.

MR. HAMPTON: It is not. But I don't think that [12] *D'Oench* requires us to look at that document alone, the *D'Oench* rule.

THE COURT: Show me where the promise that you say was the promise that was made to you is specifically in these Exhibits A, B, C, and D.

MR. HAMPTON: The promise is not made specifically, Your Honor. The promise was authorized—first, it was applied for. It was part of the deal that Mainland took the application, funded the one million seven without it, and then as late as February of 1985 they authorized the second phase loan.

THE COURT: So what you're saying—

MR. HAMPTON: That's all I have to offer.

THE COURT: So what you're saying is the documents attached as A, B, C, and D—

MR. HAMPTON: Yes.

THE COURT: —are proof of your side agreement?

MR. HAMPTON: Proof of the side agreement, if you want to call it that.

THE COURT: But if the *D'Oench* doctrine applies to this case, then the side agreement is inapplicable, whether it's oral or a side agreement that may be inferred from these applications, isn't it?

MR. HAMPTON: Just because it's a side agreement does not mean that it falls within the *D'Oench* doctrine.

[13] THE COURT: What's your understanding of the parole evidence rule?

MR. HAMPTON: Parole evidence rule in this case as far—well, I don't think it applies—or has any relationship to the *D'Oench* doctrine. It has some similarities. But basically we're talking about an Oklahoma rule. And we have writings here which prove what the transaction is. I don't think there's any question about a parole evidence situation.

THE COURT: Is there an allegation that you were fraudulently induced to accept the 1.7 million dollars?

MR. HAMPTON: Yes. Now, bear in mind, if the Court please—I didn't mean to interrupt. I'm sorry.

THE COURT: I was going to ask you, what did you do with the 1.7 million dollars that your clients say they don't have to pay back?

MR. HAMPTON: It was spent for the property, the acquisition of the property.

THE COURT: And—

MR. HAMPTON: Which was pledged, too, of course, to Mainland.

THE COURT: And as I understand the representation in your pleadings, the fraudulent inducement occurred because you claim that the banking institution knew or should have known that your client could not pay this 1.7 [14] million dollars back unless they had the additional loans forthcoming. Is that right?

MR. HAMPTON: Yes, Your Honor. But I would like to allude to some testimony.

THE COURT: All right. Is it a correct statement that the three principals of Riverfront had net worth—state financial statements reflecting their net worth to be in excess of 30 million dollars at the time of the 1.7 million dollar loan?

MR. HAMPTON: Yes. But I would ask the Court to examine for liquidity. There was no way in the world that they could raise cash within any reasonable period of time, if you look at those statements, if the Court will look at them, in order to satisfy the one million seven.

THE COURT: Don't you think that those figures cut against your fraudulent inducement argument?

MR. HAMPTON: No, sir. I really don't when I look at the statements. May I look—go ahead. I—

THE COURT: Certainly. I'd be pleased to hear whatever you have to say. I just find it hard, from an objective standpoint, to say that a bank knew or should have known that they could not pay back the 1.7 million when your clients, I assume honestly and truthfully, under the federal—

MR. HAMPTON: Sure.

[15] THE COURT: —laws governing submission of financial statements to banks, submitted to them documents showing that they were worth more than 30 million dollars in terms of their net worth. And to now claim that the bank should have known that either, (a), that was not accurate, or, (b), there was a big footnote to that 30 million that said even though it says 30 million, it doesn't really mean they can pay it back, raises some questions in the Court's mind.

MR. HAMPTON: Your Honor, the financial institution, Mainland here, should be well-equipped to interpret financial statements, much more than counsel. And I still submit to the Court that examination of that will show that there was not enough liquidity to pay that loan timely—at least timely. Now—

THE COURT: Do you contend that the financial statements submitted to the bank by your clients were false?

MR. HAMPTON: Certainly not.

THE COURT: So you then submit that the 30 million dollar representation was a true and accurate representation—

MR. HAMPTON: Yes.

THE COURT: —as of that time?

MR. HAMPTON: Certainly.

[16] THE COURT: But it's your position that the bank knew or should have known that the 30 million dollars was not an accurate picture of what they could do in terms of pay back a 1.7 million dollar loan?

MR. HAMPTON: They accepted it for whatever it was. They can say what they want to say about what it

was. But it speaks for itself as far as liquidity is concerned.

May I allude to some testimony?

THE COURT: Certainly. Is it before the Court?

MR. HAMPTON: Yes.

THE COURT: In connection with these motions?

MR. HAMPTON: Well, it's in deposition testimony. I don't know whether I've alluded to it—I think I have.

MR. SATTERFIELD: Yes, Your Honor. I submitted an entire set of the—

MR. HAMPTON: All of them, yes.

MR. SATTERFIELD: —depositions. So I would concede that counsel is entitled to rely on them.

MR. HAMPTON: Yes.

THE COURT: Very well.

MR. HAMPTON: The deposition of a man by the name of McCready was taken, a representative of Mainland. And he very succinctly states that what we have here is an open-end loan. Mainland—really we're arguing the merits of a breach, I think, more than anything else.

[17] But, anyway, Mainland was not in the habit of making open-end loans. Two things that Mainland would look for. One is either a third party to bail out the acquisition loan or Mainland, as a custom, would fund the second phase loan to pay it off. That was, I think I can well say, the habit or the custom of Mainland, according to Mr. McCready.

We have also here a profit participation agreement by a subsidiary of Mainland, which was entered into between Mainland, Mainland Building Company, something like that, the subsidiary, and the developer, Riverfront, which, under some circumstances, provided that the building company could participate in 30—up to 35 percent of the profits from this development.

So what I'm saying to this Court is when they made the acquisition loan and the profit participation agreement was signed at the same time, they got in bed—they got in bed with Riverfront. They were just as much interested in this project or, at least, almost as interested, I should say, as Riverfront.

Now, when you put all these facts together, it was not—Mainland was not in the habit of making open-end loans but in the habit of funding second loans to take out the acquisition loans. When you have statements that show a lack of liquidity to pay the loan off timely, there's no [18] way they could make a demand and just say, "Pay us the money," and these fellas could come up under those statements with the cash. Now—plus the habit, the custom, your open-end loan, the profit that they were looking to in the future.

Your Honor, the whole thing—and this whole thing was of record. The regulators could see it from beginning to end. There is not one case I have found or I have seen the intervenor present which is like this. And that's why, when I found my application for an oral argument, I referred to convoluted facts.

The *D'Oench* rule—and I don't want to belabor the matter too much. But I would refer to the—in re *Longhorn* case of Judge Eubanks of September 28, 1983, 573 F.Supp. 278.

And when one looks at that case, the test, as stated on page 280, is whether the note was designed to deceive the creditors or a public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which the FDIC relied on in insuring the bank was or was likely to be misled.

We don't have anything like that here. There's no—and if you'll look at the cases, particularly in the [19] response brief, of the intervenor, *FDIC versus Berr* involved a scheme to evade lending requirements. There was a secret side agreement, is what was secret. It was all over the records.

The *FDIC versus Investors Associates, Limited.* There there was apparently an agreement asserted that the maker would never have to pay. We haven't said that.

THE COURT: Well, again, counsel, you keep referring to the fact that this is all over the records. And I've looked at your Exhibits A, B, C, and D. And I'm just having difficulty finding the specific portions of A, B, C, and D that you say takes this out of the *D'Oench* doctrine in terms of it being, quote-unquote, all over the records.

MR. HAMPTON: Well, we have the loan application. We have two commitments made in October of 1985. And we have—finally, we have the final loan authorized.

THE COURT: But—

MR. HAMPTON: What—what—

THE COURT: —when I asked you earlier about this, I asked you if this wasn't evidence of what you say the

side agreement was or if these weren't documents from which a side agreement could be inferred.

MR. HAMPTON: Well, all right.

THE COURT: I do not see the side agreement that [20] you're referring to being reduced to writing. I see counsel being able to, perhaps, argue from these exhibits the position that you're taking.

MR. HAMPTON: Yes. But how could the *D'Oench* —excuse me, Your Honor. May I ask a question—pose a question?

How could the *D'Oench* doctrine be asserted against a loan which has already been authorized in writing, signed by the loan committee?

THE COURT: Counsel, the *D'Oench* doctrine is being asserted with respect to the 1.7 million dollar document—

MR. HAMPTON: Yes, Your Honor.

THE COURT: —that your clients received the money for, that they didn't pay back, and that they claim they now don't have to pay back due to a condition precedent that was not reduced to writing. And you're saying that an inference from these documents is that there was such a condition precedent.

MR. HAMPTON: All right. And it's been performed.

THE COURT: Well, I understand, even though you say that it's been performed. Where is your—and I'll ask this just as clear as—

MR. HAMPTON: I may be—I may be missing—

THE COURT: —I can one last time.

MR. HAMPTON: I may be missing the Court's point. [21] I wouldn't be surprised.

THE COURT: I want you to show me where in Exhibits A, B, C, and D the writings are. And, perhaps, there's specific portions of these writings on these documents that you can direct me to.

MR. HAMPTON: There is no—Your Honor, if I understand your question, there is no specific writing which says: We will on a certain date fund a construction loan of—whatever it was—6.5 or 5.5 If that's the question the Court's asking me, that is not there, of course.

THE COURT: Now, was there an offer, as I understand it, to loan you 5.5 but that was turned down?

MR. HAMPTON: Well, it was turned down because the—I can tell you why it was turned down. It was turned down because it was not adequate to fund the project. And thereafter Mainland accepted the appraisals and the budgets and, as I assert again, authorized the loan based on an 8.2 million appraisal.

THE COURT: Well, now let me see if I've got this right. They loaned you 1.7 million. You took the 1.7 million and paid it—I mean and spent it. You haven't paid any of that back. And there then came a point in time when they offered to loan you an additional 5.5 million, and your clients turned that down.

[22] MR. HAMPTON: Well, that point in time was at the time the 1.7 was made. They then made it in October of '84. And it was turned down because of the inadequate amount, because no one knew what the cost was going to be. It was a running cost.

THE COURT: I think you've answered my questions. Let me hear from opposing counsel. Does your co-counsel have any additional remarks to add?

MR. HAMPTON: No. But will I get another opportunity?

THE COURT: Do you have anything in addition to add to your papers?

MR. HAMPTON: I have some things to add to my argument very briefly, if I may.

THE COURT: Certainly. I'm going to give you a brief opportunity to present rebuttal argument.

MR. HAMPTON: Okay.

THE COURT: But if you want to—

MR. HAMPTON: I can pick it up then, if the Court please.

THE COURT: Well, I'd prefer that if you have any additional points, you raise them now. And I'll—

MR. HAMPTON: All right.

THE COURT: —give your opposing counsel a chance to respond to them.

[23] MR. HAMPTON: The defendants question that the *D'Oench* doctrine applies to all of its claims.

We have some—a tortuous claim here because of the wreckless disregard of Mainland for the rights of the defendant and the way they conducted themselves throughout this relationship as to the nature of a tort. We doubt that the *D'Oench* doctrine applies.

Now, the way this case is framed, we have a suit on a note and a mortgage prosecuted by intervenor, as

received. To that, Judge Eubanks allowed us to file a setoff. Obviously we can't do anything but setoff.

If this Court authorizes and allows a summary judgment on the note and the mortgage, defendants assert that we are yet allowed to assert our setoff on our other claims or possibly even these same claims. Simply because they may be entitled on the four—within the four corners of the loan to a summary judgment does not mean that the defendants are foreclosed from proceeding on the setoff.

THE COURT: I understand the position you've taken.

Mr. Satterfield, I'll be pleased to hear anything you have to say in response.

MR. SATTERFIELD: Thank you, Your Honor. I realize that I have been remiss. And before I make my comments, which will be indeed brief, may I introduce to [24] the Court Mrs. Kathleen Fenwick, a member of the Texas Bar—the Bars of the State of Texas, federal and state, and of the Fifth Circuit. She is a lawyer in the Andrews and Kirr firm in Houston, who are primary counsel in Mainland's receivership. And I would ask that the Court grant her leave to participate for these limited purposes at this time.

THE COURT: That will be granted.

MR. SATTERFIELD: Thank you, Your Honor. I have only one or two very short comments.

The Court has recognized the point that the defendants did not require that the terms of their claimed agreement be incorporated into the note and the mortgage and the guarantees. Because of this failing, the

note and the mortgage and the guarantees are absolute and binding on their face. And, therefore, anything contrary to them is, indeed, a side agreement as the Court has characterized it.

And with respect to the fraudulent inducement, the Court's already alluded to the fact that the parties represented to Mainland that they had a combined net worth of more than 30 million dollars.

And I might add that the nature of the side agreement was certainly one that must be characterized as being highly in favor of the debtors. The debtors are saying that "You've loaned us 1.7 million dollars on the [25] strength of your representation that you're going to loan us however many more dollars we finally tell you we're going to have to have to put the project together."

I think that's a classic case for the application of the *D'Oench* doctrine. I think that summary judgment would be properly granted here.

THE COURT: What about the claims concerning that they should still be allowed to assert a setoff?

MR. SATTERFIELD: As I see it, Your Honor, they have an administrative claim pending for these other matters within the administrative channels of the FSLIC. Those involve different issues than the 1.7 million dollars. And I think that they—that those claims can continue. I do not believe that they are in a position where they would lose the right to assert those claims administratively because this Court had entered summary judgment on the 1.7 million dollar note and allowed foreclosure of the mortgage.

THE COURT: Was this position about asserting the setoff on these claims, even if summary judgment is granted, set forth in the defendant's papers?

MR. SATTERFIELD: No, sir.

THE COURT: I reviewed the papers prior to this hearing, but I did not recall that specific request. Mr. Hampton, can you enlighten me on that?

[26] MR. HAMPTON: And what is the Court's question?

THE COURT: The Court's question is you've made the request today that even if the Court grants summary judgment in favor of the intervenor in this case that you still be allowed to assert a setoff on these claims. And your representation was that you felt that, otherwise, you might lose some rights associated with—

MR. HAMPTON: Yes.

THE COURT: —these claims.

My question is twofold. First, was this position set forth in your pleadings?

MR. HAMPTON: It's set forth in the pleadings, Your Honor. And I can only answer that one way. That issue, under the *Hutchbeth* rule or doctrine, has already been addressed by the intervenor. And Judge Eubanks has heretofore ruled on the matter, allowed the setoff in the nature of an equitable recoupment, and it's already been allowed. So what I—

THE COURT: But not in the context of a summary judgment motion. And that's my concern.

MR. HAMPTON: Well, of course, it wasn't contemplated at that time. But I think procedurally, it's already been allowed.

THE COURT: Okay. Listen to my question very carefully.

[27] In the papers that you filed with the Court in connection with this motion for summary judgment, was there anything in those papers that concerned this request for you to be allowed to assert your setoff even if the Court granted summary judgment?

MR. HAMPTON: No, Your Honor, but I make that request now.

THE COURT: That's what I'm trying to find out. My second question is with respect to your administrative claims that are pending concerning this setoff, how is it that a summary judgment granted in favor of the intervenor in this case would cause you to lose your rights on those claims?

MR. HAMPTON: First of all, Your Honor, under the administrative procedure, as set down, there is no jury trial. There's only review of the record. We have a right, under the cases—I wasn't prepared to give you the citations, but I can if the Court will give me time—upon which Judge Eubanks allowed the setoff. It has been allowed.

Let me pose this question. Suppose the jury or the Court, either one in its wisdom, says, "Yes. You guys owe this note. You defendants owe this note." That has nothing to do with our right to proceed on a setoff.

THE COURT: It doesn't unless you have an [28] opportunity to pursue those claims administratively. And, also, I have a real question as to whether or not the order that was entered at that time contemplated permitting you to pursue a setoff if the Court down the road granted a motion for summary judgment for the intervenor.

Let me ask you this directly. Was there any discussion or record made by Judge Eubanks as to what would occur if summary judgment were granted in this case?

MR. HAMPTON: I recall none. Do you, Mr. Satterfield?

MR. SATTERFIELD: I do not recall—

MR. HAMPTON: No.

MR. SATTERFIELD: —seeing any, Your Honor.

MR. HAMPTON: No.

THE COURT: Do you know of any other case that you're aware of where summary judgment has been granted to the FDIC or FSLIC where a trial has proceeded on the basis of the remaining setoff?

MR. HAMPTON: No. No, Your Honor. And I would suggest that this is probably a rare occasion and one would have a difficult time finding any.

THE COURT: Well—

MR. HAMPTON: But it still doesn't mean that we're not entitled to one.

THE COURT: Well, it also—but it also means [29] that this Court has no authority upon which to grant one unless you provide it to me.

MR. HAMPTON: Well, may I turn it around? I'm not trying to be a smart aleck. I don't know of any authority which states that it is not proper to proceed on a setoff, because the setoffs have been allowed. There's little difference, it would seem to me—

THE COURT: The setoffs have not been allowed in the sense that they have been claimed—that they have

been recognized for their merit. They've only been allowed to proceed in this case—

MR. HAMPTON: That's right.

THE COURT: —to this date.

MR. HAMPTON: That's right.

THE COURT: And I'm confident that Judge Eubanks, at the time he permitted you to make those setoff claims, did not discuss the possibility of what would occur if a motion for summary judgment in favor of the FSLIC were granted. So it is a case, before this judge, of first impression.

The fact that Judge Eubanks—

MR. HAMPTON: Well—

THE COURT: —allowed the setoff to proceed at the outset of this case doesn't necessarily require this Court to allow it to continue if a motion for summary [30] judgment is granted.

I tell you what I'm going to do. I'm going to give you seven days to submit any authority that you can find on the issue, because it is going to take me that long to draft up the order following this closing argument.

I'll tell you, Mr. Hampson, that, quite frankly, you and I have a good faith disagreement on the law in this case. And I think this is a classic case for the application of the *D'Oench* doctrine. And as a result, I am going to grant summary judgment in this case. But I'm going to set my reasoning forth in a written order since this is a case that requires some attention. And I think rather than have Mr. Satterfield prepare a proposed order, the Court will simply prepare its order.

I'll also give you seven days from today to present the Court with any authority in support of your request that your setoff proceed. And you may do that seven days from today. And, Mr. Sattefield, any authority to the contrary should be presented seven days after that is received.

So we'll proceed along those lines. And I guess that does not take this case off the September 14th docket, then, until I decide whether the setoffs will or will not proceed.

But let me tell the parties this. I've asked that [31] the parties, on the September 14th docket, appear here on September the 9th for purposes of a docket call. I'm sure that you all have seen my trial docket. It will not be necessary for these attorneys to appear on September 9th for the simple reason that I've already had a hearing with you today.

I know that if this case does proceed to trial, it's only going to proceed on whatever remaining setoff claims remain in this case. And I have serious doubts as to whether that's a jury matter, even if the Court does allow it to proceed. And at this stage, I have some doubts as to whether or not it will proceed. But I'm going to keep an open mind. If Mr. Hampton can provide me with some authority that allows me to proceed in that fashion and if I'm persuaded, then we may have that limited presentation in this case.

So I'm not going to require you to appear on September 9th, but you will be required to appear on September the 14th for the trial docket call of this matter unless you've been notified prior to that time that a written order has been issued with respect to the remaining setoff claims.

MR. HAMPTON: May I conclude by telling the Court that I thank the Court for the opportunity to make this argument.

[32] THE COURT: Certainly. I appreciated the opportunity of reading these briefs. It was an interesting case. And I thank you for appearing.

Anything further today on behalf of any counsel?

MR. SATTERFIELD: Nothing for the plaintiff, Your Honor.

THE COURT: All right. Thank you, counsel. Court's in recess.

END OF PROCEEDINGS

(Certificate of Court Reporter omitted in printing.)

APPENDIX C

12 U.S.C. §1823(e)

* * *

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

* * *

APPENDIX D

MAINLAND SAVINGS

3401 Allen Pkwy
Houston, Texas
713/524-5170

LPD 3.2-01

LOAN APPLICATION

DATE: 7/30/84

BORROWER: Riverfront Associates, L.T.D. an Oaklahoma Lmtd. Partnership

GUARANTOR(S): David B. Talbot Jr., David S. Owen & G.A.F. Structures,

TYPE OF LOAN: Land Acquisition & Pre Development

PROPERTY DESCRIPTION: Security
S.W. Corner of Enterprise Drive & So. Meridian, Oklahoma City.
238,000 S.F. of Land & 86,423 S.F. of Building

REQUESTED LOAN TERMS:

**********REQUESTED AMOUNT:	$1,700,000	Requested closing date: 8/1
**********COMMITMENT FEE:	% $	
COMMITMENT TERM:		
********LOAN ORIGINATION FEE:	1.0 % $17,000	PAID AT CLOSING
INTEREST RATE:	16.0% Fixed	
INTEREST FLOOR:	-	
PRIME BASED ON:	-	
INTEREST TO BE PAID:	Semi-annually	
AND ADJUSTED:		
THE PAYMENT RATE IF DIFFERENT FROM COUPON RATE:		
LOAN TERM:	6 Months	
AMORTIZATION:	Interest Only	
**********EXTENSION(S):	One	
EXTENSION TERM:	6 Months	
EXTENSION FEE:	1%	
***MBDC PROFIT PARTICIPATION:	35%	
**********HOLDBACK PROVISION:	-	
RENTAL OR LEASEUP REQUIREMENT:	-	

ADDITIONAL TERMS & CONDITIONS: Verification of Credit & Cash on hand. Acceptable Appraisal. Additional terms and conditions are attached on following page.

This Application is made along with an application for a/an A & D loans and a/an ---- loan.

GOOD FAITH DEPOSIT/APPLICATION FEE: $1,700.00

This deposit will be considered earned by Mainland Savings Association if a commitment is issued substantially in accordance with this application. If Mainland Savings does not issue a loan commitment, this deposit will be refunded to Borrower less a processing fee of $ $1,500.00 plus additional agreed upon underwriting expenditures not to exceed $ -.

It is further agreed that this application shall not be construed as a commitment. Mainland Savings shall not be bound by any of the terms and conditions of this application.

LOAN OFFICER

Riverfront Associates Limited
BORROWER

BY:
Donald R. Carll, President
TITLE
GAF Structures Incorporated, its General Partner

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Additional Terms and Conditions
(Attachment to Mainland Saving's Loan Application)

This A & D loan will be rolled into a 12 month construction loan and a 5 year mini-perm in an amount equal to 80% of appraised value. Terms of the construction loan will be the same as above except that the interest rate shall be 2 over prime, interest paid monthly, and profit participation equal to 20%. The mini-perm loan will bear interest at a rate to be agreed upon and have a payment rate not to exceed 13.5% with accrual not exceeding 10.0% of the loan amount. Interest will be paid monthly and profit participation will be 30%.

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Loan Officer

Riverfront Associates Limited
Borrower

By: _____
Donald R. Carll, President
Title

GAF Structures Incorporated, its
General Partner

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Loan Officer: B.Szlinis LOAN COMMITTEE APPROVAL SHEET LPD 4.2-03
Appl. No.: _____ INTERMEDIATE TERM LOAN

Requested Approval for: Approval Date 9-12-84
____Loan Original Submission Yes XXXXX
XXX Commitment Resubmission of Approval dated Attached

LEGAL BORROWING ENTITY: Riverfront Associates Limited, a Oklahoma Limited Partnership,

BORROWER'S ADDRESS: 1701 South Meridian
Oklahoma City, OKLA. 73108

GUARANTOR(S): David B. Talbot, Jr.; David S. Owens, and
CAF Structures, Incorporated

PROJECT TYPE: Construction, 106,000s/f Specialty Mall

PROPERTY ADDRESS: South Meridian Drive
Oklahoma City, OKLA.

LEGAL DESCRIPTION: _____ % RESIDENTIAL: ____%

ADDITIONAL SECURITY: 5% Equity (i.e., A&E, Closing Costs, Deferred Developers' Fee)
$275,000.00

TERMS: REQUESTED CLOSING DATE: _____

REQUESTED AMOUNT:	$ 5,500,000
COMMITMENT FEE:	1.0 % $ 55,000
COMMITMENT TERM:	12 mos
LOAN ORIGINATION FEE:	1.0 % $ 55,000 PAID AT CLOSING
INTEREST RATE:	P+2
INTEREST FLOOR:	13.5%
PRIME BASED ON:	Chase
INTEREST TO BE PAID:	Monthly
AND ADJUSTED:	
THE PAYMENT DATE IS DIFFERENT FROM COUPON DATE:	
LOAN TERM:	12 mos
AMORTIZATION:	Interest
EXTENSION(S):	—
EXTENSION TERM:	—
EXTENSION FEE:	—
HUDC PROFIT PARTICIPATION:	30%
HOLDBACK PROVISION:	
RENTAL OR LEASEUP REQUIREMENT:	

ADDITIONAL REQUIREMENTS (OTHER THAN STANDARD LOAN AGREEMENT OR COMMITMENT PROVISIONS):

1. Construction Loan 60% Phased ~~Balance~~ requirements or Master Lease to cover debt service & expenses.
2. Term Loan: 80% pre-leasing requirement or Master Lease to cover 1.1% of debt service.
3. Subject to approval of development budget by Sr. Loan Officer & Sr. Asset Mgr.
4. Subject to approval of appraiser.

A quorum is any three loan committee members including one director. Loans greater than $1,000,000 need concurrence of CEO or Managing Officer and Sr. V.P. Mortgage Lending.

LOAN COMMITTEE

CONCURRENCE

- President

- Executive Officer

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LOAN COMMITTEE MINUTES
OF
MAINLAND SAVINGS ASSOCIATION

A Loan Committee meeting was held September 12, 1984 at Mainland Savings Association, 3401 Allen Parkway, Houston, Texas. The meeting began at 2:45 p.m.

MEMBERS PRESENT:

Chairpney Smith — Jesse Bates
Richard Scott — Jerry Carver
Joe Dumesnil

OTHERS PRESENT:

Herb Hensley — Joanne Pizzigno
Gene Sullivan — Clair Cuess
Joyceanne Dickens — Bill Szlinis

AGENDA:

#	Borrower	Type (L/C)	Amount	Rate	Term	Fee	Part.%
1.	Hometex SW	Modification	$ 79,290	P+1	6 Mos.	1/2%	N/A
2.	Hometex SW	Modification	$ 73,440	P+1	6 Mos.	1/2%	N/A
3.	Hometex SW	Modification	$ 78,390	P+1	6 Mos.	1/2%	N/A
4.	Hometex SW	Modification	$ 71,640	P+1	6 Mos.	1/2%	N/A
5.	Hometex SW	Modification	$ 78,300	P+1	6 Mos.	1/2%	N/A
6.	Alex. Ramirez	Land Acquis.	$2,359,000	P+2	18 Mos.	2%	15%
7.	Adams/Yeates	Land Acquis.	$ 201,600	P+2	18 Mos.	2%	30%
[redacted]		Construction	$5,500,000	P+2	12 Mos.	2.1/2%	20%
[redacted]		Interval Loan	$5,500,000	P+2	24 Mos.	2%	30%
10.	Larry D. Johnson	Land Refinan.	$4,500,000	P+2	24 Mos.	2%	20%
11.	El Dorado Mtg.	Land A&D	$6,800,000	P+2	18 Mos.	2.1/2%	40%
12.	Hou. Tealstone	Condo Purch.	$5,000,000	14.75%ARM	30 Yr.	N/A	N/A

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Loan Officer: Bill Szlinis LOAN COMMITTEE APPROVAL SHEET LPD 4.2-03,R11/84
Appl. No.: _____ CONSTRUCTION LOAN

Requested Approval for:
XXX Loan
____ Commitment

Approval Date 2/12/85
Original Submission ~~Yes~~ / No
Resubmission of Approval dated 9/12/84 Attached

LEGAL BORROWING ENTITY: PLAZA DEL RIO, LIMITED

BORROWER'S ADDRESS: 1701 S. Meridian
Oklahoma City, OK 73108

GUARANTOR(S): David S. Owens, David B. Talbot, Jr., C.A.F. Structures, Inc.

PROJECT TYPE: Construction, specialty retail center

PROPERTY ADDRESS: Lot 1, Part of Blk. 4, Blk. 5, Lot 1, Blk. 5, Lot 2, Blk. 3, Areo - Meridian Industrial Park

LEGAL DESCRIPTION: _____ % RESIDENTIAL: ___%

ADDITIONAL SECURITY: 5% equity ($350,000), 70% prelessed (NRA)

TERMS: REQUESTED CLOSING DATE: _____

**********REQUESTED AMOUNT:	$ 6,500,000	
**********COMMITMENT FEE:	-- % $ --	
COMMITMENT TERM:	--	
********LOAN ORIGINATION FEE:	2.5 % $ 162,500	PAID AT CLOSING
INTEREST RATE:	Prime + 2	
INTEREST FLOOR:	13.5% - Cap Rate 16.5%	
PRIME BASED ON:	Chase Manhattan	
INTEREST TO BE PAID:	Monthly	
AND ADJUSTED:	Monthly	
THE PAYMENT RATE IF DIFFERENT FROM COUPON RATE:	N/A	
LOAN TERM:	12 Months	
AMORTIZATION:	Interest	
**********EXTENSION(S):	One (1)	
EXTENSION TERM:	6 Months *	* See Mini-perm (ITL) sheet
EXTENSION FEE:	1%	
***MBDC PROFIT PARTICIPATION:	20%	
**********RELEASE PROVISION:	N/A	
PRE-LEASE OR PRE-SALE REQUIREMENT:	60%	

ADDITIONAL REQUIREMENTS (OTHER THAN STANDARD LOAN AGREEMENT OR COMMITMENT PROVISIONS):

1. Subject to sale of 50% participation.
2. _____

****

A quorum is any 3 Loan Committee members including 1 director. Loans greater than $1MM need concurrence of Raymond H. Hill; or Chauncey F. Smith, Joseph J. Dumennil, and Richard H. Scott.

LOAN COMMITTEE

Approving: Declining:

CONCURRING:

Raymond H. Hill, President

Chauncey F. Smith, Managing Officer

Joseph J. Dumennil, Exec. V. P.

Richard H. Scott, Exec. V. P.

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[1] IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

No. CIV-86-13-E

MAINLAND SAVINGS ASSOCIATION,
Plaintiff,

vs.

RIVERFRONT ASSOCIATES, LTD., an Oklahoma limited partnership, et al.,
Defendants,

and

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION,
Intervenor.

DEPOSITION OF DAVID B. TALBOT, JR.
TAKEN ON BEHALF OF THE PLAINTIFF
AT OKLAHOMA CITY, OKLAHOMA
MAY 21, 1987

APPEARANCES:

MR. GREY W. SATTERFIELD, of the firm of KORNFELD, FRANKLIN & PHILLIPS, 301 N.W. 63rd, Suite 600, Oklahoma City, Oklahoma, appearing on behalf of the Plaintiff.

MR. RICHARD D. HAMPTON, 109 N. Walker, Oklahoma City, Oklahoma, appearing on behalf of the Defendants.

REPORTED BY:

AUBREY CRISP, C.S.R.

* * *

* * * [33] all the numbers and was satisfied with the leasing and everything but it just took a day or two to get it out.

Q Now, I call your attention to what's been marked as Plaintiff's Exhibit 17, Mr. Talbot, do you recognize that?

A Well, I didn't see it until Friday.

Q That was one thing I was going to ask you. You've never seen this before?

A Never in my life.

Q Did Mr. Szlinis tell you that in February—did he tell you in February of 1985, that Mainland had authorized the six point five million dollar commitment?

A No, he sure didn't.

MR. HAMPTON: Dave, excuse me, let him finish his question before you answer.

Q (BY MR. SATTERFIELD) It was my understanding that he had told you that they would commit to a loan but that 50 percent would have to be sold?

A I never heard a word of it.

Q I thought that I—

A The first word we had that they were not going to do the deal was the week of the 28th of February and that was—they didn't have the money to close, period. Never heard anything about anything.

Q Okay, that's what—I don't remember precisely [34] how you said it, but in general terms in your deposition, you were told that they—their net worth—

A I was never told anything about net worth or nothing.

MR. HAMPTON: Let him finish his question.

A Okay.

Q (BY MR. SATTERFIELD) What were you told as to why they wouldn't fund the loan?

A Didn't have the money.

Q Well, didn't have the money or that it was beyond what they were allowable on?

A Didn't have the money.

Q Okay, and who told you that?

A I got the word from Atlanta. And then I was talking to Bill, obviously I called Bill Szlinis because we were still in touch trying to get this thing worked out.

Q I thought you had testified about a requirement of the sale of the participation?

A Never told me about it.

Q All right. Do you know whether or not Mr. Owen knew about it?

A I don't think Mr. Owen did either.

Q Okay. So the six and a half million dollar commitment, subject to a five percent equity and the building being—and the develpment being 70 percent * * *?

* * *